Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	IB Docket No. 02-324
International Settlements Policy Reform	)	
International Settlement Rates	)	IB Docket No. 96-261
	)	

NOTICE OF PROPOSED RULEMAKING

Adopted: October 10, 2002 **Released: October 11, 2002**

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By the Commission:

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I. INTRODUCTION

1. We initiate this rulemaking to examine possible reform of our International Settlements Policy (ISP) and International Simple Resale (ISR) and benchmarks policies. Our primary goal underlying these policies has been and continues to be the protection of U.S. consumers from potential harm caused by instances of insufficient competition in the global telecommunications market.[1] The Commission last examined the reform of the ISP in 1999. Since then, there has developed increased participation and competition in the U.S.-international marketplace, decreased settlement and end-user rates,[2] and growing liberalization and privatization in foreign markets. In addition, as a result of U.S. policies and other factors, the

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[1] It has been the Commission's goals in regulating the U.S.-international marketplace: "(1) to promote effective competition in the global market for communications services; (2) to prevent anticompetitive conduct in the provision of international services or facilities; and (3) to encourage foreign governments to open their communications markets." *In the Matter of Market Entry and Regulation of Foreign-Affiliated Entities,* IB Docket No. 95-22, Report and Order, 11 FCC Rcd 3873 (1995) (*Foreign Carrier Entry Order*) at 3877, ¶ 6.

[2] The current international settlement rate system was developed as part of a tradition in which international telecommunications services were supplied through a bilateral correspondent relationship between national monopoly carriers. An accounting rate is the price a U.S. facilities-based carrier negotiates with a foreign carrier for handling one minute of international telephone service. We note that use of the term "accounting rate" is a term of art used internationally that bears no relation to the Commission's accounting and audit requirements. Each carrier's portion of the accounting rate is referred to as the "settlement rate" that represents a terminating access charge. The settlement rate is equal to one-half of the negotiated accounting rate under the framework of the International Settlements Policy. The settlement rate represents the bundled provision of an international half-circuit, international gateway switching, and the fee for domestic termination at either end point.

average U.S.-international settlement rate has fallen from $0.35 in 1997 to $0.14 in 2001 and, correspondingly, U.S. calling prices have dropped from $0.67 in 1997 to $0.33 in 2001.[3] These developments provide an opportunity for the Commission to review and reform our existing regulatory requirements to determine whether they remain necessary to protect U.S. consumers or whether they may be inhibiting the benefits of lower calling prices and greater service innovations to consumers. We consider in this proceeding adopting policies that would allow U.S. carriers to respond more efficiently to the dynamics of the global marketplace.[4] In addition, in this *Notice,* we inquire whether foreign mobile termination rates may be adversely affecting U.S. consumers and the market for U.S.-international services.[5] The purpose of this proceeding is to: (1) obtain further information about the competitive status of the U.S.-international marketplace; (2) seek comment widely on a variety of proposals to reform the Commission's current application of the ISP and settlement rate policies; and (3) request information on the issue of foreign mobile termination rates.

II. BACKGROUND

A. International Settlements Policy

2. The International Settlements Policy has been Commission policy since the 1930's and has its genesis in the principles of antitrust law.[6] The ISP provides a regulatory

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3 Information based upon filings made pursuant to 47 C.F.R. § 64.1001 and the FCC, Section 43.61 International Telecommunications Data 1997 and preliminary 2001 data. The average U.S.-international settlement rate is derived from the total gross payout by U.S. carriers to foreign carriers divided by the total U.S.-billed minutes to foreign points. This average includes all termination arrangements, including traditional settlement arrangements and ISR agreements. As an alternative comparison, the average, "net" or "notional" settlement rate for 1997 was $0.25 and for 2001 was $0.10. The net settlement rate is derived from the total, net payout by U.S. carriers divided by total, U.S.-billed minutes to foreign points.

4 *See infra* Part III.A, B, C.

5 *See infra* Part III.D.

6 The ISP was formerly termed the Uniform Settlements Policy, or USP. The USP initially applied to telegraph and telex services and evolved through Commission decisions and practices. The intent of the USP was to ensure that U.S. carriers were treated fairly and that consumers received the benefits that result from the provision of international services on a competitive basis. Among other things, the policy required uniform accounting rates and uniform terms for sharing of tolls. *See, e.g., Mackay Radio and Telegraph Co.,* 2 FCC 592 (Telegraph Committee 1936), *aff'd sub nom. Mackay Radio v. FCC*, 97 F.2d 641 (D.C. Cir. 1938) (In the 1936 decision, the Commission denied an application for Section 214 authority to serve Norway because the settlement terms would have permitted the Norwegian carrier to "whipsaw," or engage in anticompetitive behavior against, U.S. carriers by manipulating traffic flows and retaining a greater percentage of the accounting rate.); *Modifications of Licenses in the Fixed Public and Fixed Public Press Services*, 11 FCC 1445 (1946); *Mackay Radio and Telegraph Company,* 25 FCC 690 (1951), *rev'd on other grounds sub nom. RCA Communications, Inc. v. FCC*, 210 F.2d 694 (D.C. Cir. 1952), *vacated and remanded,* 346 U.S. 86 (1953); *TRT Telecommunications Corp.,* 46 FCC 2d 1042 (1974). In 1986, the Commission termed the USP the "ISP" and extended its application to International Message Telephone Service (IMTS), or voice service, in response to significantly greater reported (continued….)

framework within which U.S. carriers negotiate with foreign carriers to provide bilateral U.S.-international services. Historically, the market for international services has been characterized by the model of national monopoly carriers corresponding with one another. The Commission implemented the ISP in order to respond to concerns that foreign carriers with monopoly power may attempt to take advantage of the presence of multiple U.S. carriers. "Whipsawing" is commonly thought of as involving the ability of foreign carriers to obtain unduly favorable terms and conditions from U.S.-international service providers by setting competing U.S. carriers against one another.[7] "Whipsawing" generally involves instances where a foreign carrier has the ability through pressure on multiple U.S. carriers to extract higher termination rates from a U.S. carrier than the foreign carrier is required to pay to terminate traffic on the U.S. end. The goal of the ISP is to address this asymmetry in market power.[8] "Whipsawing" would result in U.S. carriers being paid at or near cost for termination of U.S.-international traffic on the U.S.-end but having to pay above-cost settlement rates for termination of U.S.-international services on the foreign-end; therefore, U.S. carriers are forced to recover these additional costs from U.S. ratepayers through higher calling prices. Thus, the ISP prevents U.S. carrier concessions to foreign carriers that may harm U.S. consumers.[9]

3. *ISP Requirements* Specifically, there are three elements of the ISP that serve as conditions on U.S. carriers entering into agreements with foreign carriers: (1) all U.S. carriers must be offered the same effective accounting rate and same effective date for the rate ("nondiscrimination"); (2) U.S. carriers are entitled to a proportionate share of U.S.-inbound, or return, traffic based upon their proportion of U.S.-outbound traffic ("proportionate return"); and (3) the accounting rate is divided evenly 50-50 between U.S. and foreign carriers for U.S. inbound and outbound traffic ("symmetrical settlement rates").[10] These requirements are

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instances of "whipsawing." The Commission also streamlined the filing of accounting rate modifications and chose not to apply the ISP to enhanced services. *See Implementation and Scope of the Uniform Settlements Policy for Parallel International Communications Routes*, Report and Order, CC Docket No. 85-204, 51 Fed. Reg. 4736 (Feb. 7, 1986) (*ISP Order*); *modified in part on recon.,* Order on Reconsideration, 2 FCC Rcd 1118 (1987) (*ISP Recon Order*); Further Reconsideration, 3 FCC Rcd 1614 (1988) (*ISP Further Recon*).

7 *See, e.g., In the Matter of Atlantic Tele-Network, Inc. Application for Authority to Acquire and Operate Facilities for Direct Service Between the U.S. and Guyana*, Order on Review, 8 FCC Rcd 4776 (1993); *In the Matter of AT&T Corp. Proposed Extension of Accounting Rate Agreement for Switched Voice Service with Argentina*, Order, 11 FCC Rcd 18,014 (1996); Order on Review, 14 FCC Rcd 8306 (1999); *In the Matter of AT&T Corp., MCI Telecommunications Corp., Sprint, and LDDS WorldCom Petitions for Waiver of the International Settlements Policy to change the Accounting Rate for Switched Voice Service with Peru*, Order and Authorization, 11 FCC Rcd 13,799 (1996); *In the Matter of AT&T Corp. and MCI Telecommunications Corp., Petition for Waiver of the International Settlements Policy to Change the Accounting Rate for Switched Voice Service with Bolivia*, Order and Authorization, 11 FCC Rcd 13,799 (1996); *In the Matter of Sprint Communications Company, L.P.*, Memorandum, Opinion and Order, 13 FCC Rcd 24,998 (1998).

8 *ISP Recon Order*, 2 FCC Rcd 1118 at 1118, ¶ 2.

9 *ISP Order,* 51 Fed. Reg. 4736 at ¶ 23.

10 *See* 47 C.F.R. § 43.51(e).

designed to create a unified bargaining position among U.S. carriers in their negotiations with foreign carriers. To date, the Commission has found the need for the ISP on noncompetitive U.S.-international routes as well as the need for oversight of agreements between U.S. and foreign carriers in order to increase the effectiveness of the Commission's pro-competitive policies to the benefit of U.S. consumers.[11]

4. Flexibility Policy Beginning in 1996, the Commission began to reform its application of the ISP to facilitate flexible, more market-based arrangements between U.S. and foreign carriers where competitive conditions indicate that the risk of anticompetitive behavior is unlikely.[12] The Commission decided in its *Flexibility Order* that a regulatory policy that permits alternative arrangements that do not conform with the requirements of the ISP would allow U.S. carriers to respond more efficiently to the dynamics of the global marketplace; would stimulate greater competition; and would result in lower settlement rates and lower end-user calling prices.[13] With lower calling prices, the U.S.-international market would experience growth and increased revenues, attracting entry into the market and benefiting both U.S. and foreign consumers.[14] Accordingly, the Commission determined that it would apply its "flexibility policy" where the legal, regulatory, and economic conditions in a foreign market support competition that constrains the abuse of market power.[15] The Commission concluded that the waiver of the ISP for specific arrangements on such routes outweighs the risks of anticompetitive behavior because the reliance on market forces and safeguards may facilitate further competition

[11] *ISP Recon Order,* 2 FCC Rcd 1118 at 1118, ¶ 1.

[12] *In the Matter of Policy Statement on International Accounting Rate Reform*, Policy Statement, 11 FCC Rcd 3146 (1996) (*Accounting Rate Policy Statement*) at 3148, ¶ 17.

[13] *In the Matter of Regulation of International Accounting Rates*, CC Docket No. 90-337 (Phase II), Fourth Report and Order, 11 FCC Rcd 20,063 (1996) (*Flexibility Order*) at 20,065-66, ¶ 7 and 20,071, ¶ 22. *Accounting Rate Policy Statement*, 11 FCC Rcd 3146 at 3146, ¶¶ 2-3. Prior to the "flexibility policy," the Commission stated it would entertain waivers of the ISP where the public interest would benefit. *See TRT Telecommunications Corp.,* 46 FCC 2d 1042 (1974). *See, e.g., In the Matter of AT&T Corp., MCI Telecommunications Corp., Petitions for Waiver of the International Settlements Policy to Change the Accounting Rate for Switched Voice with Various Countries*, Memorandum Opinion, Order and Authorization, 12 FCC Rcd 13,807 (1997).

[14] *In the Matter of International Settlement Rates*, IB Docket No. 96-261, Notice of Proposed Rulemaking, 12 FCC 6184 (1997) (*Benchmarks NPRM*) at 6188, ¶ 10.

[15] The Commission's "flexibility policy" permitted U.S. carriers to engage in alternative arrangements with foreign carriers in any country that satisfied the "effective competitive opportunities" or ECO test, or if U.S carriers could otherwise demonstrate that deviation from the ISP would promote competition while preventing anticompetitive harm. The Commission subsequently revised this standard in the *Foreign Participation Order* by creating a presumption in favor of those alternative arrangements with foreign carriers from WTO Members. *See Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket Nos. 97-142 and 95-22, Report and Order and Order on Reconsideration, 12 FCC Rcd 23,891 (1997) (*Foreign Participation Order*) at 23,896, ¶ 9. The flexibility policy was eliminated in the *ISP Reform Order*. *See In the Matter of 1998 Biennial Regulatory Review -- Reform of the International Settlements Policy and Associated Filing Requirements*, IB Docket Nos. 98-148 and 95-22, CC Docket No. 90-337 (Phase II), Report and Order and Order on Reconsideration, 14 FCC Rcd 7963 (1999) (*ISP Reform Order*).

and consumer benefits.[16]

5. <u>*ISP Reform*</u> In 1999, the Commission determined that in light of changes that had taken place in the international marketplace since the finalization of the World Trade Organization (WTO) Basic Telecom Agreement[17] and the Commission's adoption of its pro-competitive policies in the *Foreign Participation Order* and the *Benchmarks Order*, there may be circumstances where the presence of the ISP is detrimental, and the Commission should lift the policy off of U.S.-international routes, as opposed to waiving the ISP under the "flexibility policy" for specific contracts.[18] In particular, the Commission concluded in the *ISP Reform Order* that the ISP may hinder the development of competition in the U.S.-international market and preclude the achievement of more cost-based settlement rates on routes. As a result, the Commission adopted policies in the *ISP Reform Order* to remove the ISP from arrangements with foreign carriers where competitive market forces are present, as demonstrated by either the lack of foreign carrier market power or more cost-based settlement rates.[19]

6. Specifically, where a corresponding foreign carrier lacks market power or where the settlement rates are more cost-based, the benefits of lifting the ISP outweigh the policy's burdens. Often, foreign carriers without market power are new entrants in the foreign market. Without market power, the danger of anticompetitive harm from such carriers to U.S. consumers through "whipsawing" is minimal. Where foreign carriers possess market power, or are dominant, there is greater potential for "whipsawing" to occur.[20] The Commission found that competitive pressure that constrains anticompetitive behavior may be occurring in markets with dominant foreign carriers, however, if the settlement rate on a route is at least 25% below the

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16 *Flexibility Order*, 11 FCC Rcd 20,063 at 20,065-66, ¶ 7.

17 The results of the WTO basic telecommunications services negotiations are incorporated into the General Agreement on Trade in Services (GATS) by the Fourth Protocol to the GATS, April 30, 1996, 36 I.L.M. 366 (1997). These results, as well as the basic obligations contained in the GATS, are referred to herein as the "WTO Basic Telecom Agreement."

18 Under the "flexibility policy," U.S. carriers still had to seek prior authorization from the Commission to deviate from any prong of the ISP. *In the Matter of 1998 Biennial Regulatory Review -- Reform of the International Settlements Policy and Associated Filing Requirements*, IB Docket Nos. 98-148 and 95-22, CC Docket No. 90-337 (Phase II), Notice of Proposed Rulemaking, 13 FCC Rcd 15,320 (1998) (*ISP Reform NPRM*) at 15,330-31, ¶ 25.

19 As a result of the superseding policies adopted in the *ISP Reform Order,* the Commission eliminated the "flexibility policy." To determine the existence of foreign carrier market power, the Commission used the test for nondominance formulated for the "No Special Concessions" rule in 47 C.F.R. § 63.14. *ISP Reform Order,* 14 FCC Rcd 7963 at 7975-76, ¶ 36. *See infra* note 91. In addition, the Commission maintains a public list of foreign carriers presumed to possess market power. *See List of Foreign Telecommunications Carriers that are Presumed to Possess Market Power in Foreign Telecommunications Markets*, Public Notice, DA 99-809 (correction rel. June 18, 1999). The most recent version is available from the International Bureau's World Wide Web site at http://www.fcc.gov/ib.

20 *See supra* ¶ 2.

relevant benchmark.[21] The Commission explained in the *ISP Reform Order* that lifting the ISP on routes with dominant foreign carriers where the settlement rate is at least 25% below the benchmark rate would prevent the possibility of "one-way bypass" that may occur when non-traditional settlement arrangements, such as International Simple Resale agreements, are permitted.[22] Therefore, as the Commission concluded, where a U.S. carrier can demonstrate that at least 50% of the traffic on a route with a foreign carrier possessing market power, regardless of whether the carrier is from a WTO Member, is at least 25% below the relevant benchmark rate, the Commission will lift the regulations of the ISP from the route.[23]

B. International Simple Resale and Benchmarks Policies

7. Separate from, yet related to the ISP, are the Commission's settlement rate policies. These policies seek to prevent potential harm to U.S. consumers and competition by promoting more cost-based settlement rates on U.S.-international routes.[24] The Commission has previously determined that inflated consumer calling prices in the U.S.-international services market have been attributable to both above-cost international settlement rates and the lack of competition in the U.S.-international market.[25] As settlement rates are a major cost component of providing U.S.-international services, artificially-inflated settlement rates reduce incentives to decrease calling prices and negatively affect the development of competition in global markets.[26]

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21 *ISP Reform Order*, 14 FCC Rcd 7963 at 7982, para. 52.

22 Foreign carriers may engage in "one-way bypass" by forcing U.S. carriers to pay traditional bilateral settlement rates for U.S.-outbound traffic, while paying lower rates to U.S. carriers for U.S.-inbound traffic pursuant to non-ISP arrangements. The lower the differential between the settlement rate U.S. carriers pay and the non-ISP or International Simple Resale rate foreign carriers pay, the lower the cost and risk to U.S. carriers and consumers from the exploitation of the differential when the ISP is lifted off of a route. *ISP Reform Order*, 14 FCC Rcd 7963 at 7984, ¶ 56. *See infra* ¶ 22.

23 The Commission determined in the *ISP Reform Order* that it was not necessary to require that all traffic on a particular route be settled at least 25% below benchmark rates because any carrier, or combination of carriers, that carried at least 50% of the settled, U.S.-billed traffic on a route would likely have the capacity to handle all traffic from U.S. carriers. *ISP Reform Order*, 14 FCC Rcd 7963 at 7986, ¶ 61. The Commission maintains a public list of routes from which the ISP has been removed. *See Commission's List of International Routes that Satisfy Criteria for Relief from the International Settlements Policy and Associated Filing Requirements* (updated November 27, 2001). The most recent version is available from the International Bureau's World Wide Web site at http://www.fcc.gov/ib.

24 For an explanation of the accounting rate system, *see supra* note 2.

25 As the Commission explained in its *International Detariffing Order*, Commission efforts to lower accounting rates and greater participation in the U.S.-international market have helped to address those structural problems. *See In the Matter of 2000 Biennial Regulatory Review; Policy and Rules Concerning the International, Interexchange Marketplace*, IB Docket No. 00-202, Report and Order, 16 FCC Rcd 10,647 (2001) (*International Detariffing Order*). *See Motion of AT&T Corp. to be Declared Non-Dominant for International* Services, Order, 11 FCC Rcd 17,963 (1996) (*AT&T International Non-Dominance Order*).

26 *See infra* ¶ 17.

The Commission has stated that as long as settlement rates "remain substantially above-cost, foreign countries will be reluctant to introduce competition in their telecommunications market to protect this source of revenue."[27] Moreover, above-cost settlement rates and their corresponding high calling prices depress demand for U.S.-international service; adversely affect service innovations; and permit opportunities for foreign carriers to engage in "whipsawing" behavior against U.S. carriers.[28]

8. International Simple Resale In 1990, the Commission opened a proceeding to study whether there were systematic problems associated with above-cost settlement rates.[29] A year later, the Commission concluded that through the encouragement of International Simple Resale, or ISR, it could introduce competitive forces on routes that would place downward pressure on U.S.-international settlement rates. ISR involves the provision of switched services over resold or facilities-based private lines that connect to the public switched network at either end-point. Instead of U.S. carriers paying for the use of half of a shared circuit to a foreign point through traditional settlement payments, U.S. carriers under ISR arrangements may connect or lease a complete or whole circuit end-to-end to the corresponding foreign carrier's network and pay a negotiated rate for termination of services on the foreign network. Moreover, ISR arrangements are not subject to the restrictions of the ISP; therefore, U.S. carriers may negotiate individual, asymmetric, non-proportionate agreements.[30] A carrier wishing to engage in ISR

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[27] *Flexibility Order,* 11 FCC Rcd 20,063 at 20,066-67, ¶ 9. The Commission noted in the *Accounting Rate Policy Statement* that above-cost accounting rates have slowed the development of competitive markets and that this is most evident where above-cost accounting rates have prevented consumers from reaping the benefits of technological advances that lower the costs of providing service. *Accounting Rate Policy Statement,* 11 FCC Rcd 3146 at 3147, ¶ 8. Because there are generally more U.S.-outbound minutes than U.S.-inbound minutes of traffic on U.S.-international routes, U.S. carriers tend to pay net settlements to foreign carriers. Carriers credit one another for minutes of outgoing traffic and settle on the imbalance. Such factors as the large U.S. population, high *per capita* income of U.S. consumers, low U.S. calling prices, and numerous immigrant populations contribute to greater U.S.-outbound traffic flows. *See Accounting Rate Policy Statement,* 11 FCC Rcd 3146 at 3147, ¶ 9.

[28] The Commission explained in the *Benchmarks Order* and in the *Benchmarks Reconsideration Order* that above-cost settlement rates also permit foreign carriers with market power to manipulate price-cost margins that enable them to engage in "price squeezes" against U.S. carriers on routes where the foreign carrier also has an affiliation with a facilities-based U.S. carrier. *In the Matter of International Settlement Rates*, IB Docket No. 96-261, Report and Order, 12 FCC Rcd 19,806 (1997) (*Benchmarks Order*) at 19,904-05, ¶ 216; Report and Order on Reconsideration and Order Lifting Stay, 14 FCC Rcd 9256 (1999) (*Benchmarks Reconsideration Order*); *aff'd sub nom. Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999). *See In the Matter of 2000 Biennial Regulatory Review: Amendment of Parts 43 and 63 of the Commission's Rules,* IB Docket No. 00-231, Report and Order, FCC 02-154 (rel. June 10, 2002) (further narrowing one of the Section 214 benchmarks conditions so that it only applies to the provision of U.S.-international facilities-based switched services for facilities-based U.S. carriers affiliated with dominant foreign carriers).

[29] *See In the Matter of Regulation of International Accounting Rates*, CC Docket No. 90-337, Notice of Proposed Rulemaking, 5 FCC Rcd 4948 (1990) (*ISR NPRM*); Further Notice of Proposed Rulemaking, 6 FCC Rcd 3434 (1991) (*ISR FNPRM*); First Report and Order, 7 FCC Rcd 559 (1991) (*ISR Order*).

[30] We note that the ISP still remains on routes approved for ISR. The Commission retained the ISP on ISR routes in order to maintain a reporting safeguard that monitors for "one-way bypass." *See infra* note 75.

must have the appropriate Section 214 authority to provide ISR and the Commission must approve the route for ISR. A carrier petitioning to have ISR approved on a U.S.-international route must demonstrate that at least 50% of the U.S.-billed traffic on WTO routes is being settled at or below the relevant benchmark rate. In addition, for non-WTO routes, a petitioning carrier must demonstrate that the route passes an "equivalency" analysis, *i.e.,* the foreign end of the route provides equivalent opportunities to provide switched services over private lines. The Commission concluded that provision of ISR would place downward pressure on settlement rates because carriers providing switched services over resold or facilities-based private lines would compete with facilities-based carriers providing switched services over traditional, shared bilateral circuits on the route.

9. Benchmarks Policy While settlement rates are related to the costs of terminating traffic, they also reflect the relative negotiating positions and market power of carriers.[31] With greater competition, market forces should pressure settlement rates toward cost. The Commission has pursued a two-pronged approach to settlement rate reform by giving greater flexibility to U.S. carriers in their negotiations and by establishing "benchmark" settlement rates.[32]

10. As early as 1992, the Commission adopted benchmark rates on international settlement rates for specific U.S.-international routes.[33] These benchmark settlement rates served as guidelines for how much the Commission believed was the maximum reasonable and just amount U.S. carriers should pay foreign carriers for the termination of U.S.-international traffic.[34] Because settlement rates remained substantially above cost despite efforts to promote competition through reform of the ISP and introduction of ISR, the Commission decided in the 1997 *Benchmarks Order* to reform its settlement rate policies in their entirety so that consumers in all countries would reap the benefit of more cost-based settlement rates.[35] The Commission determined that with greater expected competition in the U.S.-international market from the commitments made by countries under the WTO Basic Telecom Agreement, least–cost routing methods such as refile and re-origination,[36] and technological services that bypass the settlement

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31 *See ISP Order,* 51 Fed. Reg. 4736 at ¶ 4.

32 *See International Detariffing Order*, 16 FCC Rcd 10,647.

33 *See Regulation of International Accounting Rates*, CC Docket No. 90-337 (Phase II), Second Report and Order and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 8040 (1992).

34 The Commission adopted a benchmark settlement range of \$0.23-\$0.39 for European countries and a range of \$0.39-\$0.60 for Asian countries and other regions. *Id.*

35 *Benchmarks Order,* 12 FCC Rcd 19,806 at 19,810, ¶ 7.

36 The arbitrage practices of refile and re-origination route bilateral traffic through a third country to take advantage of a lower accounting rate between the third country and the ultimate destination country. The distinction between refile and re-orgination is whether the originating carrier and the carrier in the ultimate destination country have an existing accounting rate agreement (refile) or not (re-origination). As the Commission (continued….)

rate system, settlement rates would eventually move toward cost.[37] Nevertheless, since competition and efficient pricing structures take time to develop and because there are countries that will continue to resist the introduction of competitive forces into their markets, the Commission found that regulatory oversight of U.S. carrier settlement rates through the implementation of benchmark rates would continue to be necessary to protect the public interest from unjust and unreasonable rates prohibited under the Communications Act of 1934.[38]

11. The *Benchmarks Order* requires U.S. carriers to negotiate settlement rates that comply with the "benchmark" rates established by the Commission. The benchmark rates, and the transition schedule for achieving these rates, vary depending upon a country's economic classification. The *Benchmarks Order* divides countries into five groups, based upon economic development levels as determined by information from the ITU and World Bank.[39] The Commission established benchmark settlement rates above which U.S. carriers must not pay to foreign carriers of $0.15 per minute for upper income countries; $0.19 for upper middle income and lower middle income countries; and $0.23 for low income countries and countries with teledensity less than 1.[40] The Commission adopted the transition deadlines because of the difficult task of rate-rebalancing, or pricing services in accordance with their underlying costs, for many developing countries.[41]

12. The *Benchmarks Order* became effective in 1998 with the first of the series of benchmark rates becoming effective on January 1, 1999. Since then, the Commission's data show that both U.S.-international average settlement rates and end-user calling prices have dropped dramatically. Currently, more than 89% of the approximately 18.8 billion settled U.S.-international minutes, representing at least 157 of the 203 countries with which U.S. carriers

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has previously noted, these least-cost routing practices have eroded the stability of the bilateral accounting rate system and are economically rational responses to inflated settlement rates. *Id.* at 19,811-12, ¶ 11.

37 *Id.* at 19,811-12, ¶ 11.

38 *Id.* at 19,938-43, ¶¶ 286-294. The Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.* The Telecommunications Act of 1996 (the 1996 Act) amends the Communications Act of 1934. Hereinafter, all citations to the Communications Act will be to the relevant section of the United States Code unless otherwise noted. The Communications Act of 1934, as amended, will be referred to herein as the "Communications Act" or the "Act." 47 U.S.C. §§ 201-205.

39 *See Benchmarks Order*, 12 FCC Rcd 19,806 at 19,965-66, Appendix C.

40 To monitor compliance with the benchmarks policy, the Commission requires carriers to file accounting rate modifications under Section 64.1001 of the Commission's rules and permits U.S. carriers to initiate enforcement. 47 C.F.R. § 64.1001. *See Benchmarks Order,* 12 FCC Rcd 19,806 at 19,893, ¶ 185.

41 *See Benchmarks Order,* 12 FCC Rcd 19,806 at 19,877, ¶ 147. Specifically, U.S. carriers are to pay no more than the relevant benchmark rate to foreign carriers for U.S.-international traffic settled as of Jan. 1, 1999 to upper income countries, Jan. 1, 2000 to upper middle income countries, Jan. 1, 2001 to lower middle income countries, Jan. 1, 2002 to low income countries, and Jan. 1, 2003 to low income countries with teledensities less than 1. Teledensity measures the number of access lines per 100 inhabitants.

correspond, are being settled at or below the relevant benchmark rate. As a result, the international payments U.S. carriers have made to foreign carriers for termination of U.S.-international traffic have decreased dramatically.[42] Correspondingly, U.S.-international end-user calling prices have, on average, also fallen.[43]

13. Market Factors The success of U.S. carriers in achieving lower settlement rates appears to be attributable to a combination of factors, including many beyond the Commission's regulatory policies. Greater competition in foreign markets, as well as the development of least-cost routing mechanisms such as refile or re-origination, and the emergence of technological innovations have contributed to the decline in settlement rates.[44] Refile and re-origination essentially allow U.S. carriers to take advantage of third-party foreign carrriers' better settlement rates with a destination carrier. This ability to engage in least-cost routing, as well as alternative, non-traditional services such as IP Telephony or Voice-Over-IP, in conjunction with the benchmarks policy have created a market dynamic that is pressuring international settlement rates downward.[45]

III. REQUEST FOR COMMENTS

A. Overview

14. In this *Notice,* we propose re-examining our International Settlements Policy (ISP) and settlement rate policies at this time because of the increased participation and competition in the U.S.-international marketplace, decreased settlement and end-user rates, and growing liberalization and privatization in foreign markets. In addition, because of growing concerns, we inquire whether foreign mobile termination rates may adversely affect U.S. consumers and the market for U.S.-international services.

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42 In 1997, one year before the first benchmark rate took effect, U.S. carriers paid foreign carriers $5.6 billion in net settlement payments for termination of U.S.-international calls. In 2001, after four of the benchmark categories had become effective and despite an increase in U.S.-international minutes of traffic, U.S. carriers paid foreign carriers approximately $3.3 billion. Information based upon FCC, Section 43.61 International Telecommunications Data, 1997 and preliminary 2001 data. We note that although the Commission has stated that escalating net settlement payments are a problem, the Commission's concern is not with the absolute level of U.S. net settlement payments, but rather with the extent to which those payments reflect rates that exceed the underlying costs of providing international termination services. *See Benchmarks Order,* 12 FCC Rcd 19,806 at 19,822-23, ¶ 36. We fully expect that U.S. carriers may make increased outpayments to foreign carriers if accounting rates decrease and calling prices fall, causing traffic volumes and minute imbalances to rise. *Id.* at 19,878-79, ¶ 149.

43 *See infra* ¶ 18.

44 *See supra* note 36.

45 The Commission has stated that in a fully competitive market, we would expect rates to fall to competitive levels below the benchmark rates. *Benchmarks Order,* 12 FCC Rcd 19,806 at 19,862-63, ¶ 115.

15. For more than a decade, the Commission has sought to promote competition to the benefit of consumers in the market for U.S.-international services.[46] As competition emerges in the U.S.-international marketplace, public interest harms to U.S. carriers and consumers become less probable, and the Commission is able to rely more upon market solutions and less upon regulatory requirements in some policy areas. Strong competition places downward pressures on international calling prices; stimulates technological innovation; prevents inefficiencies in markets; encourages better service quality and options; and mitigates potential anticompetitive behavior. Moreover, the Commission has worked to increase competition domestically and internationally in order to fulfill its statutory responsibilities under Section 1 of the Communications Act, "to make available . . . to all people of the United States, . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, [and public safety]."[47]

16. To make the provision of U.S.-international services more competitive, the Commission has liberalized and streamlined its market access policies in response to the U.S. commitments made pursuant to the WTO Basic Telecommunications Agreement, the commitments of trading partners, and the Commission's improved regulatory framework;[48] has implemented policies to reduce above-cost international settlement rates that act as artificial barriers to competition;[49] and has created greater flexibility for U.S. carriers to negotiate with foreign carriers through the removal of regulations.[50] As a result of the Commission's "open entry" standard adopted in the *Foreign Participation Order*, the number of foreign-owned companies in the U.S.-international market has substantially increased.[51] To date, the Commission has granted more than 3,900 Section 214 authorizations since 1991 to provide U.S.-

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46 *See ISP Order*, 51 Fed. Reg. 4736; *Foreign Carrier Entry Order,* 11 FCC Rcd 3873 (1995).

47 47 U.S.C. § 151. *See ISR FNPRM*, 6 FCC Rcd 3434 at 3435, ¶ 6.

48 *See supra* note 17. *See Foreign Participation Order*, 12 FCC Rcd 23,891; *Foreign Participation Recon Order*, 15 FCC Rcd 18,158.

49 *Benchmarks NPRM*, 12 FCC 6184; *Benchmarks Order*, 12 FCC Rcd 19,806; *Benchmarks Reconsideration Order*, 14 FCC Rcd 9256; *aff'd sub nom. Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999).

50 *Flexibility Order*, 11 FCC Rcd 20,063; *ISP Reform NPRM,* 3 FCC Rcd 15,320; *ISP Reform Order*, 14 FCC Rcd 7963.

51 In the *Foreign Participation Order*, the Commission eliminated application of the "effective competitive opportunities" (ECO) test to WTO Members as a condition of foreign carrier entry into the U.S. market. In lieu of satisfying the ECO test to obtain: (1) section 214 authorizations to provide facilities-based, switched resale, and resold non-interconnected private line service; (2) authorizations to exceed the 25% indirect foreign ownership benchmark pursuant to Section 310(b)(4) of the Act; and (3) cable landing licenses, WTO Member applicants need only satisfy an "open entry" standard that is a rebuttable presumption in favor of entry into the U.S. market for foreign applicants from WTO. *Foreign Participation Order*, 12 FCC Rcd at 23,896, ¶ 9 and at 23,913-14, ¶¶ 51-52. *See International Detariffing Order*, 16 FCC Rcd 10,647 at 10,657, ¶ 16.

international service.[52]

17. The Commission has also promoted competition by encouraging more cost-based international settlement rates.[53] As discussed above, the Commission has previously determined that high settlement rates harm competition by serving as entry barriers to competing carriers that must pay them and permit possible discrimination against smaller carriers.[54] The Commission has also concluded that U.S. consumers should not be forced to subsidize foreign countries' expenditures through hidden subsidies in calling prices.[55] Reductions in inflated settlement rates not only move prices closer to cost, but also lead to stimulation of usage of the telephone network, greater technological innovation, and declining per unit costs. Therefore, in response to these concerns, the Commission has modified its regulation of international settlement rates in order to promote lower, more cost-based rates. If settlement rates are more cost-based, it is more difficult for foreign carriers to engage in market distorting behavior.[56]

18. Since adoption of the Commission's *Benchmarks Order*, the average U.S.-international settlement rate has fallen from \$0.35 in 1997 to \$0.14 in 2001 and, correspondingly, U.S. calling prices have dropped from \$0.67 in 1997 to \$0.33 in 2001.[57] Adding to the effect of the Commission's benchmarks policy on settlement rates, the convergence of multilateral market forces from such least-cost routing mechanisms as refile and re-origination[58] have placed significant pressures to move bilateral settlement rates on many routes toward cost. Moreover, non-traditionally settled U.S.-international traffic such as International Simple Resale and alternative methods that bypass the settlement rate system such as IP Telephony and Voice-Over-IP have caused foreign carriers to respond by lowering their

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52 47 U.S.C. § 214; 47 C.F.R. § 63.18. We note that this number encompasses both U.S. and foreign carriers holding Section 214 authorizations to provide U.S.-international services on a common carrier basis.

53 *See supra* note 2.

54 *See In the Matter of Regulatory Policies and International Telecommunications,* CC Docket No. 86-494, Notice of Inquiry and Proposed Rulemaking, 2 FCC Rcd 1022 (1987) (*Regulatory Policy NPRM*) at 1034, ¶¶ 81-82.

55 *See ISR NPRM*, 5 FCC Rcd 4948; *ISR FNPRM*, 6 FCC Rcd 3434; *ISR Order*, 7 FCC Rcd 559. *See also ISR NPRM,* 5 FCC Rcd 4948 at 4949, para. 9; *Accounting Rate Policy Statement*, 11 FCC Rcd 3146 at 3147, ¶ 9; *Benchmarks Order,* 12 FCC Rcd 19,806 at 19,848, ¶ 86.

56 *Benchmarks Order*, 12 FCC Rcd 19,806 at 19,869, ¶ 132.

57 Information based upon filings made pursuant to 47 C.F.R. § 64.1001 and the FCC, Section 43.61 International Telecommunications Data 1997 and preliminary 2001 data. The average U.S.-international settlement rate is derived from the total gross payout by U.S. carriers to foreign carriers divided by the total U.S.-billed minutes to foreign points. This average includes all termination arrangements, including traditional settlement arrangements and ISR agreements. As an alternative comparison, the average, "net" or "notional" settlement rate for 1997 was \$0.25 and for 2001 was \$0.10. The net settlement rate is derived from the total, net payout by U.S. carriers divided by total, U.S.-billed minutes to foreign points.

58 *See supra* note 36.

settlement rates.

19. Liberalization in foreign markets has also increased dramatically from the combined effects of market forces and the pro-competitive commitments made by foreign countries under the WTO. Many foreign countries are actively seeking to increase competitive opportunities in their markets. According to *TeleGeography*, the number of international carriers worldwide has grown from approximately 587 in 1997 to 4,030 in 2001, representing almost a 600 percent increase.[59] Moreover, of 50 countries providing market information, competition has developed in more than 20 countries that previously had closed international markets.[60] As an illustration of this point, *TeleGeography* reports that Telecom Italia provided 100 percent of Italy's outgoing international minutes in 1997 and only 65.4 percent of outgoing international minutes in 2000.[61]

20. As we elaborate below, we seek comment on the status of the U.S.-international market, including gathering information on the development of resale "spot" markets, the emergence of IP telephony, and growth of international wireless roaming arrangements. We also seek comment on the following issues:

> (a) *International Settlements Policy*: We examine the criteria for our application of the regulatory framework of the International Settlements Policy that governs the actions of U.S. carriers in their relationships with foreign carriers on U.S.-international routes. On the other hand, a continuation of the system may be necessary to preclude the return of higher rates for customers. The restrictions of the Commission's ISP on many routes may be precluding further gains to U.S. consumers from the lack of freedom the policy affords U.S. carriers to deviate from unified bargaining positions in negotiations or whether the ISP or aspects of the ISP remains a useful policy that benefits U.S. consumers. Therefore, we request comment and information in this *Notice* on the competitive status of the U.S.-international marketplace; whether the ISP in its current form is narrowly-tailored and effective in preventing anticompetitive harms from foreign carriers with market power against U.S. carriers and consumers; and whether options to remove the regulatory restrictions of the ISP would promote greater competition while protecting the public interest on U.S.-international routes. In addition, we request comment on safeguards that may apply to routes from which we eliminate the ISP, such as standards for reimposing the ISP, the applicability of the "No Special Concessions" rule, and the maintenance of filing requirements to monitor

59 *TeleGeography 2002: Global Traffic Statistics and Commentary*, TeleGeography, Inc. (October 2001) (*Telegeography*). *Id.* at 17. We note, however, that the number of competitors does not necessarily indicate the level of competition in a market.

60 These countries had reported only one authorized international carrier in 1997, and subsequently reported additional carriers in 2001. *Telegeography* at 19.

61 *Telegeography* at 21.

compliance with the ISP and our accounting rate policies.[62] Moreover, we seek comment on whether it is appropriate to adopt transition periods or sunset dates with any proposal.

(b) *International Simple Resale and Benchmarks Policies*: As the last transition period for benchmark rates under the Commission's benchmarks policy will soon conclude, we also ask for comment on the next phase of the Commission's ISR and benchmarks policies, and what, if any, actions the Commission should consider, including revising the benchmarks policy, to encourage more cost-based settlement rates.[63]

(c) *Foreign Mobile Termination Rates*: In addition, recognizing the ongoing efforts of foreign regulatory authorities, we inquire whether foreign mobile carriers may be engaged in abuses of market power to the detriment of U.S. consumers and competition in their setting of charges for mobile termination of U.S.-international calls. To the extent such foreign mobile termination charges may artificially inflate U.S. carriers' costs of providing international service and increase consumer calling prices, we seek comment on ways to address the issue and better inform consumers.[64]

(d) *Foreign Markets*: We also seek comment on the state of competition in foreign markets as it relates to the ISP. Is competition increasing as rapidly as expected? In what percentage of countries is a government-owned or controlled carrier the dominant provider or terminator? Is the ownership structure of the dominant provider relevant to this proceeding and to competition in general? Have recent problems in the worldwide telecommunications sector reduced the pace of liberalization internationally? Are these problems likely to slow privatization or lead to more consolidation and less competition?

B. Reforming the International Settlements Policy

21. The ISP was intended to protect the public interest and has been successful. We seek comment on whether it continues to serve the public interest or, instead, whether another policy would best promote lower overall rates for consumers. The restrictions of the ISP that are intended to protect the public interest may in reality hinder the ability of U.S. carriers to negotiate more cost-based settlement rates and efficient terms in their agreements with foreign carriers.[65] Because the ISP focuses on creating a unified bargaining position for U.S. carriers, it

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62 *See infra* Part III.B.

63 *See infra* Part III.C.

64 *See infra* Part III.D.

65 *See Flexibility Order,* 11 FCC Rcd 20,063; *ISP Reform NPRM*, 13 FCC Rcd 15,320 ¶¶ 9-11; *ISP Reform Order*, 14 FCC Rcd 7963.

denies U.S. carriers the freedom to respond quickly to changing conditions in the global telecommunications marketplace.[66] In addition, the nondiscrimination requirement that requires foreign carriers to offer U.S. carriers the same rate and same effective date prohibits individualized agreements and creates possible "free rider" problems as new rates are negotiated.[67] On the hand, these rules reduce the ability of foreign carriers to "whipsaw" U.S. carriers and ensure that more established carriers cannot effectively lock out new entrants by signing better rate agreements based upon their larger amounts of traffic. Moreover, the proportionate return requirement of the ISP which requires U.S. carriers to receive the same proportion of U.S.-inbound traffic as they send outbound, tends to preserve the market positions of U.S. carriers at the expense of new entrants.[68] Therefore, we seek comment on whether the rules support competition or discourage competition.[69]

22. As described above, as a result of these potentially adverse consequences on competition, the Commission began to tailor the application of the ISP more narrowly in 1999 in the *ISP Reform Order*. Specifically, the Commission considered various options to remove the ISP from U.S.-international routes and decided that on those routes where the settlement rate is more cost-based or the foreign carrier lacks market power, the ISP should be lifted. In that proceeding, the Commission considered and rejected other options similar to those now set forth in this *Notice*, based upon information then before it. In rejecting a proposal to lift the ISP from all U.S.-WTO routes,[70] the Commission expressed concern at the time that the markets of some WTO countries remained closed and the opportunities to refile and re-originate traffic might not have been realistic alternatives for the termination of large amounts of traffic into such countries. In addition, the Commission expressed concern that where settlement rates were still considerably above-cost, the risk of anticompetitive harm to U.S. carriers might have continued to exist, as rates that are not cost-based would permit foreign carriers to take advantage of the differential between cost-based accounting rates and benchmark rates, permitting them to engage

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[66] *See Flexibility Order*, 11 FCC Rcd 20,063, ¶ 7.

[67] "Free rider" market failures generally involve parties being able to take advantage of the services offered by another party without making expenditures for such services. If free-riding U.S. carriers do not incur the costs associated with negotiating individual agreements with foreign carriers, U.S. carriers that do negotiate bear greater costs than competitors. In addition, to the detriment of U.S. consumers, fewer U.S. carriers have the incentive to negotiate individually, as they will not obtain a greater individual benefit from negotiating, since every firm will receive the same results and benefits. *See MIT Dictionary of Modern Economics*, ed. David W. Pearce, 4 ed., MIT Press, Cambridge at 163. *See also ISP Reform Order*, 14 FCC Rcd 7963 at 7972, ¶ 24 (noting that negotiating carriers have reduced incentives to negotiate aggressively under the ISP).

[68] *See Flexibility Order*, 11 FCC Rcd 20,063 at 20,069, ¶ 15.

[69] *Id.* at 20,070-71, ¶ 19.

[70] *See ISP Reform Order*, 14 FCC Rcd 7963 at 7987-88, ¶ 63.

in "one-way bypass" or "whipsaw" U.S. carriers.[71] The Commission also rejected the option in the *ISP Reform Order* to remove the ISP from benchmark-compliant routes based upon the concern that the benchmark rates were still considerably above-cost.[72] The Commission also expressed concern that foreign carriers would not have the incentive to negotiate rates below, as opposed to at, the benchmarks if the Commission adopted such a standard.[73] As to the possibility of removing the ISP from ISR-approved routes,[74] the Commission concluded in the *ISP Reform Order* that because of the risk of "one-way bypass," the Commission should retain the ISP on ISR-approved routes in order to monitor possible changes in the imbalance of settled minutes that would occur if a foreign carrier engaged in such anticompetitive conduct.[75]

23. Since the Commission last examined its application of the ISP, the U.S.-international telecommunications market has undergone changes that have resulted in considerably more options for U.S. carriers to terminate traffic. Traditionally, in order for foreign carriers to engage in "whipsawing" behavior effectively against U.S. carriers, there must be no available, alternative means of terminating U.S.-international traffic in the foreign market.[76] Because more countries have liberalized their telecommunications markets to fulfill their WTO obligations, there are greater numbers of competing carriers in foreign markets that terminate U.S.-international traffic.[77] In addition as described above, the increase in least-cost routing mechanisms and innovative services has provided options to terminate traffic where desirable bilateral opportunities may not exist. We seek comment on whether these assumptions

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[71] *See ISP Reform NPRM,* 13 FCC Rcd 15,320 at 15,332, ¶ 29*; ISP Reform Order*, 14 FCC Rcd 7963 at 7984, ¶ 56.

[72] *See Benchmarks Order,* 12 FCC Rcd 19,806 at 19,826, ¶ 41. The Commission determined in the Benchmarks Order that, in a competitive marketplace, calling prices would approximate long-run incremental costs, or the marginal costs, of providing a call. However, the Commission based the benchmark rates on publicly-available foreign carrier tariffs, so the current benchmark rates encompass not only incremental costs, including the cost of capital, and some contribution to joint or common costs, but historical costs and monopoly rents as well.

[73] *See ISP Reform Order*, 14 FCC Rcd 7963 at 7984, ¶ 56.

[74] *ISP Reform NPRM,* 13 FCC Rcd 15,320 at 15,331, ¶ 27.

[75] *See ISP Reform Order*, 14 FCC Rcd 7963 at 7986-87, ¶ 62. The Commission determined in the *Benchmarks Order* that if the ratio of U.S.-outbound to U.S.-inbound traffic settled under the ISP increases 10 or more percent in two successive quarterly measurement period, there is a presumption that a market distortion has occurred as U.S.-inbound traffic would be diverted over private lines. *Benchmarks Order*, 12 FCC Rcd 19,806 at 19,919, ¶¶ 249-250. We note that, thus far, the Commission has not found "one-way bypass" to have occurred on any U.S.-international routes.

[76] If there are no options for U.S. carriers to obtain termination services except to deal bilaterally with the foreign carrier on a route, the foreign carrier has the ability to pit U.S. carriers against one another and force concessions; otherwise, a U.S. carrier potentially risks losing business on those routes to other U.S. competitors. *See ISP Reform Order*, 14 FCC Rcd 7963 at 7965-66, ¶ 8.

[77] *See supra* ¶ 19.

are correct, and especially whether significantly more options are available for foreign termination.

24. As market conditions become more competitive, the ISP may be more burdensome to U.S. carriers and detrimental to U.S. consumers. The existence of non-ISP arrangements such as ISR demonstrate that agreements that deviate from the ISP's requirements also can result in significantly lower settlement rates and more efficient arrangements. For example, the average U.S.-international ISR rate for 2001 was approximately 9 cents per minute, as opposed to 19 cents for traditional settlement rates negotiated within the ISP framework.[78]

25. The ISP has greatly benefited U.S. consumers and competition by protecting U.S. carriers in their negotiations with dominant foreign carriers that may abuse their market power and lead to higher costs of providing service and higher calling prices. However, the ISP now may also have the unintended effect of impeding further progress toward competitive markets and reduced settlement rates to the extent alternative means of terminating traffic in a foreign market exist, whether bilateral through multiple competitors on the foreign end, or multilateral through refile or reorigination arrangements. We request comment on how and whether or not the ISP may be constraining the development of competition and whether alternative means of terminating traffic would better serve the public interest.

26. In this *Notice*, we seek comment on the proposal to re-examine the Commission's current standards for removing the ISP adopted in the *ISP Reform Order.* We propose three alternative standards to consider for removing the ISP from U.S.-international routes, in addition to considering retention of our current standards, and seek comment broadly on other possible options. These options include removing the ISP from: (1) all U.S.-international routes; (2) benchmark-compliant routes; or (3) ISR-approved routes. We also ask whether, for any of these options, the ownership structure of a terminating dominant foreign carrier (*e.g.,* government ownership, vertical integration, or other factors) should be relevant to lifting the ISP. We also encourage commenters to suggest other approaches.

27. Accordingly, we first request information on the competitive status of the U.S.-international market for calling services and what dangers of anticompetitive harm may still exist. In order to assist the Commission in making conclusions regarding the possible relaxation of our ISP requirements, we request further information from commenters regarding current market conditions that may affect the provision of U.S.-international services. For example, is traditional "whipsawing" on bilateral routes still a concern, or, in the current U.S.-international market, are there other potential anticompetitive practices that are of concern to U.S. carriers? Please identify any anticompetitive practices on a country-by-country basis where appropriate. Is the provision of U.S.-international traffic increasingly carried over private lines using Internet Protocol? Are there competitive concerns associated with the growth of international wireless roaming agreements negotiated between U.S and foreign carriers? We also seek comment on

[78] Aggregated data based upon filings made pursuant to Section 64.1001 of the Commission's rules. 47 C.F.R. § 64.1001. We note that the average settlement rate in this paragraph differs from the rate stated in paragraph 18 because the average in this paragraph only reflects traditional ISP arrangements.

whether the requirements of the ISP and accompanying rules are effective and appropriately tailored to deter anticompetitive harm or should be revised or replaced. Are conditions in the U.S.-international marketplace sufficiently competitive that additional reform regarding the applicability of the ISP and accompanying rules would encourage further development of competition and technological innovation to the benefit of U.S. consumers?[79] Are there particular routes, countries, or types of countries where the ISP, or another similar rule, remains important?

28. Commenters should also explain whether and how the ISP may hinder their ability to achieve more cost-based termination rates. In order to assist in our analysis, we encourage commenters to submit information on market activities such as data on refiling and re-origination and other arbitrage mechanisms that may place pressure on foreign carriers to liberalize their markets and reduce settlement rates. Specifically, commenters should provide information about the number of foreign points they serve that have alternative bilateral or multilateral options for the termination of traffic. In addition, we request that commenters provide further information about the existence of resale "spot" markets that provide buying and selling opportunities for capacity on international circuits and how such market mechanisms may place downward pressure on international termination rates and consumer calling prices. To the extent commenters believe information they submit is confidential, they may file a request for confidential treatment pursuant to Section 0.459 of the Commission's rules.[80]

29. Should commenters identify specific competitive concerns, we seek comment on possible safeguards to address those concerns, including standards for reimposing the ISP, the prohibitions of the "No Special Concessions" rule,[81] and the maintenance of filing requirements and accounting rate modifications to monitor anticompetitive behavior. Commenters should also consider the interdependency of the Commission's ISP and settlement rate policies and how modification of one may affect the other. In addition, we seek comment on whether a transition period is appropriate should the Commission decide to reform further its application of the ISP, as well as whether the Commission should adopt a sunset for any possible rules. We generally seek comment on these specific proposals, alternative proposals commenters may suggest, and other considerations regarding the effectiveness of the ISP.[82]

1. All U.S.-international Routes

30. In light of the market developments we discuss in this item, we seek comment on whether competitive market forces have developed to such an extent that the restrictions of the

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[79] *See, e.g.,* 47 C.F.R. §§ 43.51(e), 64.1001.

[80] 47 C.F.R. § 0.459. *See Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd 24816, 24828 (1998), Order on Reconsideration, 14 FCC Rcd 20128 (1999). *See* Comment Filing Procedures, *infra* Part IV.D.

[81] *See* discussion, *infra* ¶¶ 38-39.

[82] *See* 47 C.F.R. § 43.51(e).

ISP are unnecessary at this time for all U.S.-international routes, including both U.S.-WTO and non-WTO Member routes. We seek comment on whether the growth in opportunities to terminate bilateral traffic through multilateral mechanisms, ongoing changes in technology, and increased privatization and liberalization in foreign markets have created such favorable conditions in the global telecommunications market that we should now consider more rapid deregulation of the U.S.-international market, or whether the continued presence of many government-owned carriers, the level of competition internationally, or other factors support continued reliance on existing rules. Will these competitive forces drive international termination rates toward cost and minimize the likelihood that foreign carriers with market power will engage in anticompetitive harm or will they drive prices higher for consumers overall, as opposed to for customers of the largest companies?

31. Under this proposal, traffic would no longer be traditionally settled under the ISP. Therefore, this option would result in the elimination of the Commission's standards for approving ISR. Accordingly, as we inquire further below, we seek comment on whether standards for reimposing the ISP and other potential safeguards may offset the risk of anticompetitive harm from foreign carriers with market power. Furthermore, we inquire whether the Commission should retain its benchmarks policy in the event the ISP may be reinstated on a route. We generally seek comment on the changes to our rules and policies this proposal would require.[83]

2. Benchmark-compliant Routes

32. We seek comment in this *Notice* on the option of removing the ISP from benchmark-compliant routes. Since the *ISP Reform Order*, further developments regarding decreased accounting rates, increased participation in the U.S.-international market, and greater foreign market liberalization present the opportunity to revisit the Commission's earlier conclusions regarding this option. Removing the ISP from benchmark-compliant routes would eliminate the need for approval of ISR. Unlike the option of removing the ISP from ISR-approved routes, removing the ISP from benchmark-compliant U.S.-international routes would not distinguish between those routes on which U.S. carriers correspond with carriers from WTO as opposed to non-WTO Members. However, the ISP would remain on routes where U.S. carriers have been unable to negotiate benchmark-compliant rates with foreign carriers that possess market power. Currently, foreign carriers on at least 157 of the 203 U.S.-international routes have negotiated benchmark-compliant rates with U.S. carriers.

33. We seek comment on whether the previous concerns of "one-way bypass" or "whipsawing" on benchmark-compliant routes continue to exist in view of market changes now taking place. To the extent these concerns remain, do the benefits of lifting the ISP on such routes outweigh the concerns in light of the fact that a substantial amount of U.S.-international minutes are being settled in many cases below the benchmark rates? As we seek comment regarding other proposals, we likewise inquire under this proposal whether safeguards for

[83] *See, e.g.,* 47 C.F.R. §§ 43.51, 43.61, 63.16, 63.18, 63.22, 63.23, 64.1001.

reimposing the ISP and monitoring possible anticompetitive behavior may sufficiently protect the public interest. Under this proposed option, will other competitive pressures in the U.S.-international market resulting from the pro-competitive commitments of WTO members, least-cost routing mechanisms, and technological bypass continue to provide incentives for foreign carriers to reduce their international termination rates below the benchmark rates? We note that, in 2001, approximately 11.3 billion settled U.S.-international minutes, or 60% of the total settled U.S.-international minutes of traffic, were settled *below* the benchmark rates.[84] What are the consequences of eliminating our ISR policies under this option? We ask commenters to address what would be necessary changes to Section 63.16 and other Commission rules.[85]

3. ISR-approved Routes

34. We seek comment in this *Notice* on the proposal to remove the ISP from ISR-approved routes. We seek comment on whether changed conditions in the U.S.-international market mitigate the Commission's prior concerns such that we can remove the ISP from ISR-approved routes. In this proposal, the standard for approving ISR would replace the current standard adopted in the *ISP Reform Order* for lifting the ISP off of U.S.-international routes with foreign carriers that possess market power.[86] The standard for approving ISR would replace the current standard adopted in the *ISP Reform Order* for lifting the ISP off of U.S.-international routes with foreign carriers that possess market power. Therefore, this proposal would require carriers seeking to lift the ISP from a U.S.-international route to demonstrate that at least 50% of the U.S.-billed traffic on WTO routes is being settled at or below the relevant benchmark and for non-WTO routes, additionally satisfy the "equivalency" analysis. The ISP would remain on those WTO routes where U.S. carriers have been unable to negotiate benchmark-compliant rates or on non-WTO routes where the foreign carrier does not also provide equivalent opportunities. Pursuant to such a framework, U.S. carriers would have the flexibility to engage in non-ISP agreements with foreign carriers on ISR-approved routes without having to seek prior approval from the Commission. We note that, at present, more than 70 of the 203 foreign points U.S. carriers serve are approved for the provision of ISR.[87] We seek comment on this proposed reconciliation of the ISR and ISP standards, and whether such a modification of our policies would give additional incentives to foreign carriers to agree to more cost-based settlement rates at or below the benchmark rates. We seek comment on this option and variations of it that commenters might propose.

35. Furthermore, to the extent that the Commission's previous concerns about "whipsawing" and "one-way bypass" continue to exist, we seek comment on whether safeguards

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84 Information based upon preliminary FCC, Section 43.61 International Telecommunications Data 2001.

85 *See, e.g.,* 47 C.F.R. §§ 43.51, 43.61, 63.16, 63.18, 63.22, 63.23, 64.1001.

86 47 C.F.R. § 63.16.

87 The Commission maintains a list of U.S.-international routes approved for the provision of ISR on its website. The most recent version is available from the International Bureau's World Wide Web site at http://www.fcc.gov/ib.

for re-imposing the ISP, as discussed below, may provide alternative ways of monitoring for potential anticompetitive behavior on routes where foreign carriers possess market power. We seek comment on this possible option for removing the ISP, possible changes to the Commission's rules,[88] and on methods for implementing the proposal.

4. Safeguards

36. We ask parties to comment on the extent of potential anticompetitive harm to U.S. carriers and consumers that may be associated with the above options to reform the ISP, and what safeguards may be necessary to prevent any such harm and protect consumers. To what extent and by what means should the Commission retain the ability to intervene on U.S.-international routes where the ISP has been removed but where U.S. carriers are subject to "whipsawing" and competition is harmed as a result? For example, should we adopt standards and require carriers to make particular showings for the Commission to re-impose the ISP on routes? Should the Commission also modify or eliminate the "No Special Concessions" rule as discussed below? What revisions of the Commission's filing requirements may be necessary? Is a transition period necessary to permit U.S. carriers to phase-out their current ISP arrangements on routes?

a. Standards for Reimposing the ISP

37. The Commission has consistently reserved the right to impose safeguards on a case-by-case basis on routes where it permits non-ISP agreements if there is a need to prevent market distortions.[89] We seek comment on what standard or demonstration may be necessary to take remedial action and reimpose the ISP to protect the public interest. Specifically, commenters should consider whether a decision to re-impose the ISP or take action should be based upon a case-by-case analysis or a presumptive test. In addition, we seek comment on whether a demonstration of "whipsawing" or other anticompetitive behavior sufficiently mandates the reinstatement of the ISP on a U.S.-international route or whether other public interest factors should also be weighed. We further seek comment on whether the Commission's current annual and quarterly traffic and revenue reporting requirements in Section 43.61 of the Commission's rules, along with other filing requirements, provide sufficient information to enable carriers to demonstrate such potential standards have been met and permit Commission enforcement or whether additional reporting requirements are necessary.[90]

b. "No Special Concessions" Requirement

38. We seek comment on whether we should maintain, under any of the proposals above to reform the ISP, the application of the "No Special Concessions" rule as it currently

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[88] *See, e.g.,* 47 C.F.R. §§ 43.51, 43.61, 63.16, 63.18, 63.22, 63.23, 64.1001.

[89] *See Flexibility Order*, 11 FCC Rcd 20,063 at 20,084, ¶ 50; *ISP Reform Order*, 14 FCC Rcd 7963 at 7973, ¶ 30.

[90] 47 C.F.R. § 43.61. *See Benchmarks Order*, 12 FCC Rcd 19,806 at 19,919-20, ¶ 251.

applies to non-ISP routes.[91] Generally, special concessions between U.S. and foreign carriers with market power pose an unacceptable risk of anticompetitive harm in the U.S.-international services market; whereas, special concessions between U.S. carriers and foreign carriers that lack market power may permit carriers to offer innovative services that result in lower rates to U.S. consumers. To monitor compliance with the ISP and the "No Special Concessions" requirements, the Commission requires the public filing of contracts and accounting rate modifications with foreign carriers possessing market power per Sections 43.51 and 64.1001 of the Commission's rules, respectively.[92]

39. Under existing rules, when the Commission lifts the ISP from a route, U.S. carriers may seek different or exclusive rates from foreign carriers; thus the "No Special Concessions" rule does not apply to the terms and conditions *under which traffic is settled*. However, the Commission reaffirmed the need for the "No Special Concessions" rule with respect to matters other than the terms and conditions relating to the settlement of traffic on routes with foreign carriers possessing market power, regardless of whether the Commission removes the ISP from a route, because the danger of discriminatory behavior still existed.[93] We seek comment whether the risk of such discriminatory behavior has decreased sufficiently to narrow further or eliminate this rule.

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[91] 47 C.F.R. § 63.14. Originally, the "No Special Concessions" rule applied to arrangements with all foreign carriers. *Foreign Carrier Entry Order*, 11 FCC Rcd 3873 at 3971-72, ¶¶ 257-258. In the *Foreign Participation Order*, the Commission narrowed the rule to apply to agreements with foreign carriers that possess market power. *Foreign Participation Order*, 12 FCC Rcd 23,891 at 23,957-65, ¶¶ 156-170. Regarding the dominance of foreign carriers, the Commission determined that if a foreign carrier possesses less than 50% market share in each of the three relevant input markets, it shall presumptively be classified as nondominant. The three relevant markets are (1) international transport facilities or services, including cable landing station access and backhaul facilities; (2) inter-city facilities or services; and (3) local access facilities or services on the foreign end of a particular route. In this *Notice*, we focus on the dominant status of foreign carriers. However, when referring to the dominant status of U.S. carriers, unless otherwise noted, we intend to invoke the reference to dominant classification set forth in 47 C.F.R. § 63.10. The regulatory safeguards imposed on U.S. carriers that are regulated as dominant on particular routes because of a U.S. carrier's affiliation with a foreign carrier with market power differ from the regulatory safeguards that the Commission has imposed on U.S. carriers that are dominant for reasons other than a foreign carrier affiliation, *e.g.,* tariff requirements.

[92] 47 C.F.R. §§ 43.51, 64.1001. The Commission has noted that "whipsawing" tends to exist in the negotiation stage prior to the filing of service agreements or rate modifications by U.S. carriers with the Commission. Therefore, the ISP is focused on affecting the negotiating leverage of U.S. carriers. However, the Commission has used the oversight of filed agreements to monitor compliance with the ISP's requirements. *See ISP Order,* 51 Fed. Reg. 4736 at ¶ 2.

[93] The Commission narrowed the application of the "No Special Concessions" rule in the *ISP Reform Order* by partially removing the rule as it applies to terms and conditions *under which traffic is settled*, including the allocation of return traffic or "grooming" arrangements, on a route where the Commission removes the ISP. *ISP Reform Order*, 14 FCC Rcd at 7994-96, ¶¶ 82-88 and at 7995, ¶ 85. For example, the "No Special Concessions" rule still applies to terms and conditions unrelated to the settlement of traffic, such as interconnection of international facilities, private line provisioning and maintenance and quality of service on routes where the ISP is lifted. Id. at ¶ 86. See *also Foreign Participation Recon Order*, 15 FCC Rcd 18,158.

c. Filing Requirements

40. We additionally request comment on whether the Commission should maintain public or confidential filings of termination rates on routes where foreign carriers possess market power. As previously explained,[94] the public filing of accounting rate modifications permits U.S. carriers to obtain the same rates and effective dates under the ISP's nondiscrimination requirement, and in doing so, may create a "free rider" effect with harmful consequences. For example, U.S. carriers may not individually expend the effort to negotiate rates with foreign carriers but, instead, permit other U.S. carriers to take the lead on negotiations and "piggyback" on those agreements. Therefore, in addition to limiting U.S. carriers' ability to negotiate individualized agreements, the nondiscrimination requirement results in a "free rider" effect that may also provide disincentives for U.S. carriers to negotiate aggressively for more cost-based rates. Moreover, as the Commission has previously noted in eliminating the filing of agreements between U.S. carriers and nondominant foreign carriers, the public filing of agreements may have a "chilling" effect on the ability to achieve more cost-based rates as foreign carriers may be reluctant to enter into new arrangements if they are publicly available.[95] On the other hand, the ability of the public and competitors to detect potential anticompetitive harm, which has been a rationale for public availability of filings, remains important.

41. As part of their discussion of the proposed options to revise the Commission's standards for removing the ISP, commenters should address whether any filing of rates or contracts pursuant to Sections 64.1001 and 43.51 of the Commission's rules with foreign carriers that possess market power should be made at the Commission.[96] We seek comment on whether revisions to the Commission's filing requirements are necessary under any option and would enable the Commission to address potential anticompetitive harm as well as continue to monitor progress toward more cost-based termination rates on U.S.-international routes.

5. Transition Period and Sunset Dates

42. We seek comment on the treatment of existing agreements negotiated within the framework of the ISP on routes from which we may consider lifting the ISP. We request comment in this *Notice* on whether any of the proposals to remove the ISP may affect existing commercial agreements and whether a transition period that permits the phase-out of the ISP in order for U.S. carriers to negotiate new arrangements is appropriate, and if so, for what period of time a transition period would be reasonable. In addition, we seek comment on whether any rules and policies the Commission may adopt should also be limited by sunset dates.

C. International Simple Resale and Benchmark Policies

43. In this *Notice*, we request comment on whether the Commission should re-

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94 *See supra* ¶ 21.

95 *ISP Reform Order*, 14 FCC Rcd 7963 at 7973, ¶ 28.

96 47 C.F.R. §§ 43.51, 64.1001.

examine its settlement rate policies, including the benchmarks policy and ISR policies in light of the trend of more foreign carriers settling at more cost-based settlement rates. Significant progress in achieving more cost-based settlement rates has occurred as a result of the Commission's ISR and benchmarks policy as well as the introduction of competition in many markets.[97] Since the implementation of the benchmarks policy, carriers and consumers in the U.S. and abroad have witnessed significantly lower average settlement rates and lower end-user calling prices.[98]

44. The benchmark rates are still considerably above actual cost-based rates.[99] At present, one transition deadline for the benchmarks policy remains.[100] The Commission stated in the *Benchmarks Order* that it might be appropriate for the Commission to consider periodic revisions of the original benchmark rates established in 1997.[101] As we noted above,[102] many settlement rates are below the benchmark rates. We request comment on whether the Commission should consider revision to the benchmarks policy or make no changes to the policy as it currently exists. In addition, we request comment on the prospect for settlement rates to continue to fall below the benchmark rates. How should we address cases where U.S. carriers have not achieved benchmark rates by the required transition dates? Would periodic updates of the benchmark rates and transition dates be helpful in keeping pace with cost reductions from greater efficiencies carriers gain over time? Would revisions to lower the benchmark rates achieve more cost-based rates and what might be the effect on developing countries with lower settlement rates? Moreover, we note that the *per capita* incomes of some countries may have improved or worsened since the adoption of the *Benchmarks Order*. Should we modify the classification of those countries? Are apparent market trends sufficient for us to consider the elimination of the benchmarks policy? If so, under what circumstances? What has been the telecommunications policy impact of the benchmarks policy on consumers and users in foreign markets? What has been the effect on the U.S. telecommunications leadership role in multilateral organizations such as the International Telecommunication Union, Organization for Economic Co-operation and Development, and WTO? Should the Commission consider a sunset date for the benchmarks policy? Are there additional reasons beyond those set forth in the

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97 As previously discussed, more than 70 U.S.-international routes are approved for the provision of ISR. The ability to negotiate rates outside the restrictions of the ISP to terminate switched services provided over private lines has placed downward pressure on U.S.-international settlement rates. In addition, the benchmarks policy is nearing completion with significant success. Currently, there are benchmark-compliant rates for more than 154 of the 203 U.S.-international routes on which U.S. carriers provide services.

98 *See supra* ¶ 18.

99 *See Benchmarks Order*, 12 FCC Rcd 19,806 at 19,855-56, ¶ 102.

100 U.S. carriers must negotiate a settlement rate of no more than $0.23 for traffic settled beginning Jan. 1, 2003 with foreign carriers from countries with teledensity less than 1.

101 *See Benchmarks Order*, 12 FCC Rcd 19,806 at 19,861, ¶ 112.

102 *See supra* ¶ 33.

Benchmarks Order for non-enforcement of the benchmarks policy?[103] For example, are there U.S.-international routes that are *de minimis* in terms of volume of minutes, net settlement payments, or other factors such that enforcing the benchmark rates would be counterproductive from a telecommunications policy perspective as well as an economic and foreign policy perspective? If so, what factors should the Commission consider in making such a determination? Parties should also comment on the interdependency of the Commission's ISP and settlement rate policies.

D. Foreign Mobile Termination Rates

45. Finally, we request comment on a concern that may be eroding the benefits of lower international termination rates for U.S. carriers and consumers, as some U.S. consumers are absorbing high mobile interconnection rates certain foreign carriers impose on U.S.-outbound calls to countries with "calling party pays" regulatory regimes. Under a "calling party pays" regulatory framework, mobile phone subscribers pay only for the outgoing calls they place to others. The "calling party" is responsible for the payment of calls placed to mobile phones. Many countries other than the United States have adopted this regulatory regime for payment flows on the basis that a "calling party pays" framework may make wireless services more affordable for lower income consumers who do not have to incur the cost of receiving calls and may encourage greater use of wireless services by removing the incentive to keep a mobile phone turned off to avoid paying for incoming calls. However, the predominant regulatory framework in the U.S. is "receiving party pays" in which mobile phone subscribers pay for both outgoing and incoming calls.[104]

[103] U.S. carriers may seek Commission enforcement of the benchmark rates by submitting a petition that: (1) demonstrates that the U.S. carrier has been unable to negotiate a settlement rate that complies with the benchmark rate; and (2) requests that the Commission take enforcement measures to ensure that no U.S. carrier pays more than the benchmark rate. The Commission will also take into consideration the individual circumstances surrounding each petition in determining the appropriate enforcement action. In addition to granting transition deadlines to reach the benchmark rates, the Commission also set forth two limited exceptions to the enforcement of the benchmarks: (1) any interested party may ask the Commission to reconsider these rates on the grounds that they do not permit the recovery of total service long run incremental costs incurred to receive, transmit and terminate international service; and (2) the Commission will consider giving additional transition time based upon a U.S. carrier's petition if annual reductions in settlement rates would entail a loss of greater than 20% of a country's annual telecom revenues. *Benchmarks Order,* 12 FCC Rcd 19,806 at 19,842-43, ¶ 74 and at 19,888-89, ¶ 174.

[104] We note that the Commission began an inquiry in 1997 as to whether regulatory action was necessary to promote "calling party pays" services in the United States. In 1999, the Commission issued a Declaratory Ruling and Notice of Proposed Rulemaking requesting comment on issues related to billing and customer notification under "calling party pays." In 2001, noting the diverse views on the issues raised in the proceeding, the Commission terminated the proceeding, explaining that it was not clear that regulatory intervention was warranted, as existing rules did not preclude carriers from offering "calling party pays" services to consumers. Moreover, the Commission noted that new pricing plans offering flat-rate pricing and providing free first-minutes for incoming calls appeared to offer consumers many of the same potential benefits of "calling party pays" services. *Calling Party Pays Service Offering in the Commercial Mobile Services*, WT Docket No. 97-207, Notice of Inquiry, 12 FCC Rcd 17,693 (1997); Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC (continued….)

46. When U.S. consumers place a U.S.-outbound international call, they may be unaware either that they are dialing a mobile phone in a foreign country or of the termination charges that may be associated with the call. U.S. service providers that carry such outbound calls to mobile phones are, in many cases, incurring additional fees from foreign mobile providers for terminating the calls onto mobile phones. For example, a U.S. carrier may have a negotiated rate with a foreign wireline carrier operating the public switched telephone network in the foreign country to provide ISR. If the U.S.-outbound call is terminating on the network of a mobile provider in the foreign country, there is an additional termination charge passed back through to the U.S. carrier, under "calling party pays," when the call is handed-off to the foreign mobile provider for termination. U.S. providers generally recoup these mobile termination costs from U.S. consumers through rate surcharges. Examples of the highest current per minute mobile surcharges include: $0.28 for France; $0.22 for Haiti; $0.32 for Panama; $0.22 for the United Kingdom; and $0.33 for Uruguay.[105]

47. We note that this issue appears most obviously on routes where U.S. carriers have negotiated ISR agreements with foreign carriers because ISR rates only include the cost of terminating with the corresponding foreign carrier; whereas, settlement rates negotiated under traditional ISP agreements cover all costs of termination in the foreign country, including termination services for foreign mobile networks.[106] To the extent that ISR rates plus foreign mobile termination fees may exceed the applicable benchmark settlement rate negotiated under the ISP for a route, U.S. carriers may alternatively choose to settle traffic pursuant to the ISP. As discussed above, the potential benefits to U.S. carriers and consumer of negotiating agreements outside the restrictions of the ISP, such as lower rates and individualized, more efficient terms, would then be lost.

48. Currently, as much as 21% of global calls appear to be terminating on mobile networks.[107] As more consumers of international services subscribe to wireless services, mobile termination surcharges likely will come under growing scrutiny generally. Foreign mobile termination fees that do not reflect the cost of providing termination services on mobile networks may artificially inflate U.S.-international calling prices to the detriment of U.S. consumers.

49. In September 2002, the Commission issued a consumer alert regarding the issue of foreign mobile termination rates.[108] The alert informed consumers that international calls

(Continued from previous page)
Rcd 10,861 (1999); Memorandum Opinion and Order on Reconsideration and Order Terminating Proceeding, 16 FCC Rcd 8297 (2001).

105 *See, e.g.,* "What is an international mobile surcharge?," available at www.mci.com; "Consumer Information: AT&T Mobile Termination Charge Information for International Callers," available at www.att.com; "International Mobile Termination," available at www.sprint.com/mobilesurchage.

106 *See supra* note 2.

107 *Telegeography* at 76.

108 Federal Communications Commission Consumer Alert "Surcharges for International Calls to Mobile Phones," September 23, 2002 available at www.fcc.gov.

placed to mobile phones may result in surcharges on their bills and advised consumers to check with their long distance carriers for more specific information about international mobile surcharges.

50. To address this matter internationally, the U.S. Trade Representative has expressed concern over the possibility that foreign mobile carriers in Europe may be engaged in abuses of market power in their setting of mobile termination rates.[109] In addition, the United States has recognized the concern about foreign mobile termination rates in multilateral fora such as the International Telecommunication Union.[110] We also note that foreign regulatory authorities are examining possible anticompetitive behavior and seeking ways to address the matter.[111] We will follow these proceedings with interest.

51. We seek comment on the issue of foreign mobile termination rates and whether such rates are detrimentally affecting U.S. consumers and competition in the U.S.-international services market. To the extent there is potential harm to U.S. consumers and competition, we request comment on whether it is necessary for the Commission to address high mobile termination rates passed on to U.S. consumers, and, if so, how we may effectively do so. Regarding consumer information, we understand that several U.S. carriers have made efforts to alert their customers of potential surcharges they may incur through bill inserts, postcards, and websites.[112] Moreover, we seek comment in this *Notice* on ways to improve consumer awareness and information about mobile termination surcharges. We therefore seek comment on whether we should rely on market forces alone to protect U.S. consumers from high foreign termination rates or should take steps to address any harm to consumers. Are foreign carriers in fact abusing market power? How are foreign mobile carriers or landline carriers involved in mobile termination able to exert market power in this context, given that, as detailed in our discussion of the ISP, we have found that the international market has become substantially more competitive?

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[109] *See* "Results of the 2002 'Section 1377' Review of Telecommunication Trade Agreements," Office of the United States Trade Representative (April 3, 2002).

[110] Concerns relating to mobile termination of U.S.-originated calls similarly arise with respect to the provision of Home Country Direct or International Toll-Free Services originating on foreign mobile networks, as such services are treated as U.S.-billed or originated calls and "calling party pays" permits foreign mobile carriers to pass along "origination fees" to U.S. providers. *See* United States of America, "Technical Methods for Identifying Mobile-Originated Calls to Home Country Direct (HCD) and International Toll-Free Services (ITFS)," International Telecommunication Union, Telecommunications Standardization Sector, Study Group 3 – Contribution 22 (April 2002).

[111] *See, e.g.,* Australia Competition and Consumer Commission, "Pricing Methodology for the GSM and CDMA Termination Services – Draft Report," available at www.accc.gov.au; EC Press Release, "Commission suspects KPN of abusing its dominant position for the termination of calls on its mobile network," IP/02/483 (Brussels, 27 March 2002); L'Autorité de Régulation des Télécommunications (Telecommunications Regulatory Authority, France), "Decrease of the Price of Fixed to Mobile Calls," available at www.art-telecom.fr (Paris, 19 November 2001); UK Competition Commission, Press Statement, "Mobile Phone Inquiry," available at www.competition-commission.org.uk (London, 23 July 2002).

[112] *Supra* note 105.

We seek comment on these questions.

IV. PROCEDURAL MATTERS

A. Ex Parte Presentations

52. This proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[113] Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.[114] Other rules pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules as well.

B. Initial Regulatory Flexibility Analysis

53. Pursuant to the Regulatory Flexibility Act (RFA),[115] the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and actions considered in this Notice. The text of the IRFA is set forth in Appendix A. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Notice as provided in paragraph 56 below. The Commission will send a copy of the Notice, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[116]

C. Initial Paperwork Reduction Act of 1995 Analysis

54. This Notice of Proposed Rulemaking contains either proposed and/or modified information collections. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this *Notice*, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. Public and agency comments are due at the same time as other comments on this *Notice*; OMB comments are due 60 days from date of publication of this *Notice* in the Federal Register.

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113 47 C.F.R. §§ 1.1200, 1.1206; *Amendment of 47 C.F.R. § 1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings*, GC Docket No. 95-21, Report and Order, 12 FCC Rcd 7348 (1997).

114 47 C.F.R. § 1.1206(b)(2).

115 *See* 5 U.S.C. § 603. The RFA, *see* U.S.C. §601 *et seq*., has been amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

116 5 U.S.C. § 603(a).

D. Comment Filing Procedures

55. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments in response to this Notice no later than Tuesday, December 10, 2002. Reply comments to these comments may be filed no later than Thursday, January 9, 2003. All pleadings are to reference IB Docket Nos. 96-261, 02-324. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. Parties are strongly encouraged to file electronically. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24,121 (1998).

56. Comments filed through the ECFS can be sent as an electronic file via the Internet to http://www.fcc/gov/e-file/ecfs.html. Parties should transmit one copy of their comments separately to each of the dockets in the caption of this rulemaking. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send and e-mail to ecfs@fcc.gov and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

57. Because of recent mail delivery issues, parties are urged to file electronically. However, parties choosing to file by paper must file an original and four copies of each filing in IB Docket No. 02-324. Parties must also submit two additional copies for IB Docket No. 96-261. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail.

58. Parties who choose to file by paper must file an original and four copies of each filing. Each filing should also include an electronic version of the comments filed. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's mail contractor, Vistronix, Inc. will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, S.W., Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

59. Comments submitted on diskette should be on a 3.5 inch diskette formatted in an IBM-compatible format using Word for Windows or compatible software. The diskette should be clearly labeled with the commenter's name, proceeding (including the docket number, in this case, IB Docket Nos. 02-324, 96-261), type of pleading (comment or reply comment), date of

submission, and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy – Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file.

60. All parties must file one copy of each pleading electronically or by paper to each of the following:

(1) The Commission's duplicating contractor, Qualex International, 445 12th Street, S.W., Room CY-B402, Washington, D.C. 20554; e-mail: qualexint@aol.com; facsimile: (202) 863-2898; phone (202) 863-2893.

(2) James Ball, Chief, Policy Division, International Bureau, 445 12th Street, S.W., Washington, D.C. 20554; e-mail: JBall@fcc.gov.

(3) Lisa Choi, Senior Legal Advisor, Policy Division, International Bureau, 445 12th Street, S.W., Washington, D.C. 20554; e-mail: LChoi@fcc.gov.

(4) Gardner Foster, Attorney, Policy Division, International Bureau, 445 12th Street, S.W., Washington, D.C. 20554; e-mail GFoster@fcc.gov.

61. Comments and reply comments and any other filed documents in this matter may be obtained from Qualex International, in person at 445 12th Street, S.W., Room CY-B402, Washington, D.C. 20554, via telephone at (202) 863-2893, via facsimile at (202) 863-2898, or via e-mail at qualexint@aol.com. The pleadings will be also available for public inspection and copying during regular business hours in the FCC Reference Information Center, Room CY-A257, 445 Twelfth Street, S.W., Washington, D.C. 20554 and through the Commission's Electronic Filing System (ECFS) accessible on the Commission's World Wide Website, www.fcc.gov.

62. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with Section 1.49 and all other applicable sections of the Commission's rules.[117] All parties are encouraged to utilize a table of contents, to include the name of the filing party and the date of the filing on each page of their comments' length of their submission. We also strongly encourage that parties track the organization set forth in this Notice in order to facilitate our internal review process.

63. Written comments by the public on the proposed and/or modified information collections are due the same day that comments on the Notice of Proposed Rulemaking are due. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before 60 days after the date of publication in the Federal Register of the Notice of Proposed Rulemaking. In addition to filing comments with the Secretary, Marlene H. Dortch, a copy of any comments on the information

[117] 47 C.F.R. § 1.49.

collection(s) contained herein should be submitted to Kim A. Johnson, OMB Desk Officer, Room 10236 NEOB, 725 17th Street, N.W., Washington, DC 20503 or via the Internet to Kim_A._Johnson@omb.eop.gov.

64. Commenters who file information that they believe is proprietary may request confidential treatment pursuant to Section 0.459 of the Commission's rules. Commenters should file both their original comments for which they request confidentiality and redacted comments, along with their request for confidential treatment. Commenters should not file proprietary information electronically. *See Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd 24816 (1998), Order on Reconsideration, 14 FCC Rcd 20128 (1999). Even if the Commission grants confidential treatment, information that does not fall within a specific exemption pursuant to the Freedom of Information Act (FOIA) must be publicly disclosed pursuant to an appropriate request. *See* 47 C.F.R.§ 0.461; 5 U.S.C. § 552. We note that the Commission may grant requests for confidential treatment either conditionally or unconditionally. As such, we note that the Commission has the discretion to release information on public interest grounds that does fall within the scope of a FOIA exemption.

E. Further Information

65. For further information regarding this proceeding, contact James Ball, Chief, Policy Division, International Bureau, Lisa Choi, Senior Legal Advisor, Policy Division, International Bureau, or Gardner Foster, Attorney, Policy Division, International Bureau at (202) 418-1460. Information regarding this proceeding and others may also be found on the Commission's website at www.fcc.gov.

V. ORDERING CLAUSES

66. Accordingly, IT IS ORDERED that, pursuant to sections 1, 4(i)-4(j), 201-205, 214, 303(r), and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i)-154(j), 201-205, 214, 303(r), 309, this NOTICE OF PROPOSED RULEMAKING IS HEREBY ADOPTED.

67. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center shall send a copy of this NOTICE OF PROPOSED RULEMAKING, including the initial regulatory flexibility analysis, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 601, *et seq.* (1981).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

INITAL REGULATORY FLEXIBILITY ANALYSIS

68. As required by the Regulatory Flexibility Act (RFA),[118] as amended, the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this Biennial Review 2002: Reform of the International Settlements Policy and Associated Filing Requirements; International Settlement Rates, Notice of Proposed Rulemaking (*Notice*).[119] Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Notice* provided above in paragraph 56. The Commission will send a copy of the *Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[120] In addition, the *Notice* and IRFA will be published in the Federal Register.[121]

A. Need for, and Objectives of, the Proposed Rules

69. In recent years there has been increased participation and competition in the U.S.-international marketplace, decreased settlement and end-user rates, and growing liberalization and privatization in foreign markets. Because of this increase, the Commission believes that it is an appropriate time to re-examine its International Settlements Policy (ISP) and accounting rate policies. In this proceeding, the Commission expects to obtain further information about the competitive status of the U.S.-international marketplace. In addition, the Commission solicits comment on a wide variety of proposals to reform its current application of the ISP and settlement rate policies. Lastly, the Commission requests information on the issue of foreign mobile termination rates and their impact on U.S. consumers.

B. Legal Basis

70. The *Notice* is adopted pursuant to Sections 1, 4(i) and (j), 201-205, 214, 303(r), and 309 of the Communications Act of 1934 as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j), 201-205, 214, 303(r), and 309.

C. Description and Estimate of the Number of Small entities to Which the

[118] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[119] *See* Biennial Review 2002: Reform of the International Settlements Policy and Associated Filing Requirements; International Settlement Rates, IB Docket Nos. 02-XXX and 96-261, Notice of Proposed Rulemaking (*Notice).*

[120] *See* 5 U.S.C. § 603(a).

[121] *Id.*

Proposals will Apply

71. The RFA directs agencies to provide a description of, and, where feasible, estimate of the number of small entities that may be affected by the proposals, if adopted.[122] The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction" under the Small Business Act.[123] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[124]

72. The proposals contained in the Notice may directly affect approximately 26 facilities-based U.S.-international carriers providing IMTS traffic. Neither the Commission nor the SBA has developed a definition of "small entity" specifically applicable to these international carriers. The closest applicable definition provides that a small entity is one with 1,500 or fewer employees.[125] We do not have data specifying the number of these carriers that are not independently owned and operated, and have fewer than 1,500 employees. Furthermore, because not all agreements between the U.S. and foreign carriers are required to be filed at the Commission, it is difficult to determine how many of these 26 carriers might have agreements with foreign carriers. The Notice solicits comments on a wide variety of proposals, and the proposals are intended to promote market-based policies and reduce unnecessary regulatory burdens on all facilities-based U.S.-international carriers regardless of size.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

73. The *Notice* seeks a wide variety of information on the Commission's ISP and international settlement rates policies. In developing these policies, the Commission implemented various reporting requirements to monitor possible anticompetitive behavior and protect the public interest. The *Notice* does not propose reporting requirements. Rather, the *Notice* solicits comments on whether the Commission should retain, eliminate, or develop new/additional reporting requirements.

74. For example, the *Notice* seeks comment on whether the Commission should

[122] 5 U.S.C. § 603(b)(3).

[123] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[124] 15 U.S.C. § 632.

[125] 13 C.F.R. § 121.201, NAICS codes 513310 and 513322.

maintain filing requirements to monitor a carrier's compliance with the ISP and the settlement rate policies. The *Notice* seeks comment on possible safeguards that could be implemented to address specific competitive concerns. The *Notice* seeks comment on whether the existing annual and quarterly traffic and revenue reporting requirements under Section 43.61 of the Commission's rules provide sufficient information to enable carriers to demonstrate that potential standards have been met and to permit Commission enforcement. The Commission requests comment on whether it should maintain public or confidential filings of termination rates on routes where foreign carriers process market power. The Commission seeks comment on whether any filing rates or contracts under Sections 64.2002 and 43.51 of the Commission's rules need to be made at the Commission. Also, the Commission seeks comment on whether it should revise the filing requirements based on any options that may be raised by commenters in this proceeding.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

75. The RFA requires that, to the extent consistent with the objectives of applicable statutes, the analysis shall discuss significant alternatives such as: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage or the rule, or any part thereof, for small entities.[126]

76. The proposals in this *Notice* are designed to provide the Commission with information in order to determine whether its existing regulatory regime may inhibit the benefits of lower calling prices and greater service innovations to consumers. The Commission anticipates that there are possibly 13 small entities that would be subject to proposals contained in the *Notice*. Because the *Notice* is broad and the proposals would likely affect only 26 facilities-based carriers, it would be difficult to adopt specific alternatives for the 13 small entities. The proposals contained in the *Notice* would benefit all entities, including small entities.

77. The *Notice* does propose steps that would minimize the economic impact on all entities, including small entities. For example, the Commission seeks comment on whether to remove the ISP from ISR-approved routes. This proposal would eliminate the burden of seeking prior Commission approval before a carrier could enter into arrangements with foreign carriers. Among other proposals addressed in the *Notice*, the Commission proposes the adoption of possible transition periods. Such transition periods would ease the burdens for all entities in complying with new rules or regulations. In addition, the Commission proposes the adoption of sunset provisions for rules and policies. The *Notice* requests information on whether to remove

[126] 5 U.S.C. § 603(c)(1)-(c)(4).

regulatory restrictions of the ISP and reform the Commission's settlement rate policies in order to promote greater competition. Any changes to our existing policies and rules will expand the ability of all entities, including small entities, to reap the economic benefits of competition. Thus, the *Notice* does not propose any exemption for small entities.

F. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rules

78. None.